



Litigation Update

Litigation Section News

September 2009

Incomplete motion to reconsider does not extend time for appeal. After the court granted defendant's anti-SLAPP motion (*Code Civ. Proc.* §425.16), plaintiff filed a motion to reconsider. But, the motion was unsupported by any declaration and the court denied it for lack of substantive merit. Then plaintiff appealed from the order granting the anti-SLAPP motion. By this time more than 60 days had elapsed since service of the notice of entry of judgment. Plaintiff argued that his time to appeal was extended by *Cal. Rules of Court*, rule 8.108, which extends the time to appeal by 30 days if a party files a motion to reconsider. The Court of Appeal dismissed the appeal as untimely. A motion for reconsideration is not valid if not supported by a declaration or affidavit. Therefore, rule 8.108 did not apply. *Branner v. Regents of the University of California* (Cal. App. Third Dist.; July 14, 2009) 175 Cal.App.4th 1043, [2009 DJDAR 10325].

Party who defeats motion to avoid arbitration is a "prevailing party" entitled to attorney fees. In *Turner v. Schultz* (Cal. App. First Dist., Div. 4; July 13, 2009) 175 Cal.App.4th 974, [2009 DJDAR 10317], the contract contained arbitration and attorney fee clauses. Plaintiff refused to arbitrate and brought an action to enjoin the arbitration. He lost and the trial court awarded defendant attorney fees. On appeal, plaintiff argued that it could not be determined who the prevailing party is until after the arbitration was completed. The Court of Appeal disagreed and affirmed the award. Defendant prevailed in a "legal action . . . to enforce" the contract.

Court lacks power to sanction lawyers for violation of rules of professional conduct. *Code Civ. Proc.* §177.5 authorizes courts to impose monetary sanctions for violation of a lawful court order. In *Conservatorship of Becerra* (Cal. App. Fourth Dist., Div. 1; July 28, 2009) (Case No. D053519) [2009 DJDAR 11071], the trial court had sanctioned a lawyer under §177.5 for communicating with an opposing party who was represented by counsel in violation of Rule 2-100(A). The Court of Appeal reversed noting that the *California Rules of Professional Conduct* are not court orders and therefore, such a violation was not sanctionable under §177.5.

Lawyer who drafts will is not disqualified from representing executor in dispute with beneficiary. In *Baker, Manock, & Jensen v. Sup.Ct. (Salwasser)* (Cal. App. Fifth Dist.; July 22, 2009) 175 Cal.App.4th 1414, [2009 DJDAR 10897], the trial court disqualified counsel who had drafted a will from representing the executor in a dispute with a potential

beneficiary. The Court of Appeal reversed. Although cases such as *Lucas v. Hamm* (1961) 56 Cal.2d 583, [364 P.2d 685, 15 Cal.Rptr. 821], have held that a lawyer may be liable to an intended beneficiary if, because of the lawyer's error, the intended beneficiary does not receive the bequest intended by the testator, these holdings do not create an attorney-client relationship between the lawyer and the potential beneficiary.

All community property is subject to restitution order against a spouse. After husband was found guilty, the court ordered payment of restitution to his victims. After an apartment complex, owned by defendant and his wife as community property, was sold, the District Court ordered all of the proceeds be used to pay for restitution. Defendant's wife claimed that half of the proceeds belonged to her. Both the District Court and the Circuit Court disagreed. Under California law, community property is subject in its entirety to the debts of either spouse and

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Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

a restitution order is a "debt." *United States v. Berger* (9th Cir.; July 31, 2009) (Case No. 08-50415) [2009 DJDAR 11263].

"Unreasonable belief in self defense" does not convert an assault into an accident.

Insured under a policy covering liability claims for "accidents resulting in bodily injury" hit and kicked his victim. As part of a settlement agreement between the two, plaintiff stipulated that insured used force because of his "unreasonable belief of having to defend himself." The insurer denied coverage and the victim, under an assignment from the insured, sued the insurer. The trial court sustained the insurer's demurrer. The Court of Appeal reversed. But the California Supreme Court, in turn, reversed the Court of Appeal. Whether or not the insured harbored an unreasonable belief, his actions were intentional and not accidental. *Delgado v. Interinsurance Exchange of The Automobile Club of Southern California* (Cal.Supr.Ct.; August 3, 2009) (Case No. S155129) [2009 DJDAR 11344].

Secret placement of video cameras in employees' work area does not necessarily invade their privacy. Employees have a reasonable expectation of privacy in their offices. Where employer secretly placed video cameras in their office but did not operate them during employees working hours their rights were not violated. The cameras were placed to check

after-hours conduct by an employee suspected of accessing pornography and this was not such an egregious violation of plaintiff's privacy rights as would highly offend a reasonable person. *Hernandez v. Hillsides, Inc.* (Cal.Supr.Ct.; August 3, 2009) (Case No. S147552) [2009 DJDAR 11365].

No prejudgment interest when collecting for dishonored checks. *Civ. Code* §1719 provides that one who passes a check with insufficient funds is liable for the amount of the check plus a service charge. In *Imperial Merchant Services, Inc. v. Hunt* (Cal.Supr.Ct.; August 10, 2009) (Case No. S163577) [2009 DJDAR 11757], our Supreme Court held that the statute provides the only civil relief available and therefore, a creditor may not collect prejudgment interest on the dishonored check.

Attorney liens have priority over other liens. Under the general rules, the lien that was created earliest takes priority over later liens. But, in *Gilman v. Dalby* (Cal. App. Third Dist.; August 10, 2009) (Case No. C050294) [2009 DJDAR 11751], the Court of Appeal held that for personal injury cases, attorney liens have priority, even if created later than the medical lien.

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

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